2001

State of Utah, Plaintiff-Appellee, vs. David R. Taylor, Defendant-Appellant : Brief of Appellee

Utah Court of Appeals

Keith C. Barnes; Jensen, Graff & Barnes; Attorney for Appellant.
Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; R. Don Brown; Sevier County Attorney; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DAVID R. TAYLOR, Defendant/Appellant.	Case No. 20010183-CA

BRIEF OF APPELLEE

AN APPEAL FROM A CONVICTION FOR ASSAULT BY PRISONER, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-102.5 (1999), IN THE SIXTH JUDICIAL DISTRICT COURT OF UTAH, SEVIER COUNTY, THE HONORABLE K. L. McKIFF PRESIDING

JEFFREY S. GRAY, Bar No. 5852
Assistant Attorney General
MARK L. SHURTLEFF, Bar No. 4666
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

KEITH C. BARNES
Jensen, Graff & Barnes, LLP
250 South Main P.O. Box 726
Cedar City, UT 84720

Attorney for Appellant

R. DON BROWN
Sevier County Attorney

Attorneys for Appellee

NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. DAVID R. TAYLOR, Defendant/Appellant.	Case No. 20010183-CA

BRIEF OF APPELLEE

AN APPEAL FROM A CONVICTION FOR ASSAULT BY PRISONER, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-102.5 (1999), IN THE SIXTH JUDICIAL DISTRICT COURT OF UTAH, SEVIER COUNTY, THE HONORABLE K. L. McKIFF PRESIDING

JEFFREY S. GRAY, Bar No. 5852
Assistant Attorney General
MARK L. SHURTLEFF, Bar No. 4666
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
PO BOX 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

Attorneys for Appellee

KEITH C. BARNES
Jensen, Graff & Barnes, LLP
250 South Main P.O. Box 726
Cedar City, UT 84720

Attorney for Appellant

R. DON BROWN
Sevier County Attorney

NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE AUTHORITY

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

STATUTES

COURT RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, **Plaintiff/Appellee,** **vs.** **DAVID R. TAYLOR,** **Defendant/Appellant.**	**Case No. 20010183-CA** **Priority No. 2**

BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for assault by prisoner, a third degree felony, in violation of Utah Code Ann. § 76-5-102.5 (1999). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF THE ISSUES

Did the trial court properly deny defendant's motion for new trial based on the victim's recantation letter, where the victim testified at an evidentiary hearing that he testified truthfully at trial and his recantation was coerced by defendant's friend and brothers?

Standard of Review. This Court "review[s] the denial of a motion for a new trial based on newly discovered evidence on the same basis as any other denial of a new trial motion—whether the trial court abused its discretion." *State v. Loose*, 2000 UT 11, ¶ 16, 994 P.2d 1237.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah R. Crim. P. 24 is relevant to a determination of this case and the relevant portion thereof is reproduced in the text of the brief.

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged with assault by prisoner, a third degree felony. R. 1. Following a preliminary hearing, defendant was bound over for trial. R. 26. A jury subsequently convicted defendant as charged. R. 69-71, 87. Thereafter, defendant filed motions to arrest judgment and for a new trial based on a letter from the victim to the trial judge recanting his trial testimony. R. 90-101.[1] Following an evidentiary hearing, the trial court denied defendant's motions. R. 110-11. Defendant was sentenced to an indeterminate prison term of up to five years. R. 118. Defendant timely appealed. R. 124-25.

SUMMARY OF FACTS

The Assault.[2] On May 13, 2000, while Mark Pennington was serving time in the county jail for assault on a peace officer and other charges, he and defendant became embroiled in an argument. T-1: 6-7, 10. As the argument continued, defendant doubled up his fist and hit Pennington in the abdomen, followed by a blow to Pennington's kidney area.

---

[1]The letter from Mark Pennington to Judge McKiff, R. 100-01, is reproduced in the addendum.

[2]Because defendant has not included in the record on appeal a transcript of the trial, the State takes its facts from the preliminary hearing, paginated in the record as T-1.

T-1: 7-8. He hit Pennington two or three more times before leaving for the dining area of the jail. T-1: 8. Pennington did not defend himself. T-1: 8, 15.

The Recantation. Two days after the trial, Pennington wrote a letter to Judge McKiff, who presided over the trial. R. 100-01 (Addendum). In that letter, he stated that he "did not want to testify against [defendant]," but that officers told him that he would be "put in a Utah State Prison if [he] did not testify." R. 100. He explained that he held nothing against defendant and that he wanted to "just live [his] life with no problems." R. 100. Finally, he alleged that he "never wanted anything to happen [b]ecause nothing ever did." R. 100.

After defendant moved for a new trial based on the letter, the trial court held an evidentiary hearing. *See* R. 90-94, 100-01, 110-11; T-2.[3] At the hearing, Pennington confirmed that he testified truthfully at the trial. T-2: 7, 10. He explained that on the night following the trial, defendant's two younger brothers and a family friend assailed him in the Albertson's parking lot and told him to write the letter "or harm would come to my family and me." T-2: 7-8, 21, 28. The next day, he was driven to defendant's mother's house. T-2: 9-10, 29. After speaking with her, Pennington wrote the letter to Judge McKiff, which was later delivered to him by defendant's mother. T-2: 9-10, 29, 40. Pennington also testified that at the behest of defendant's friend, he telephoned defendant's attorney with the

[3]The transcript of the evidentiary hearing is paginated as T-2.

recantation as well. T-2: 11-12. Pennington testified that he complied with these demands because of the threats made against him and his family. *See* T-2: 15; *see also* T-2: 30.[4]

SUMMARY OF ARGUMENT

To obtain a new trial based on newly discovered evidence, defendant must demonstrate that the evidence: (1) "could not, with reasonable diligence, have been discovered and produced at trial," (2) "is not merely cumulative," and (3) "make[s] a different result probable on retrial." *State v. Loose*, 2000 UT 11, at ¶ 16, 994 P.2d 1237 (other internal quotes omitted). Only the third prong of the test is at issue on appeal. In concluding that the victim's recantation letter did not make a different result probable on retrial, the trial court properly considered the victim's credibility, the substance of the letter itself, and the evidence at trial. Defendant has not demonstrated that the trial court abused its discretion in assessing those factors and denying his motion for a new trial.

ARGUMENT

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

Under rule 24 of the Utah Rules of Criminal Procedure, the trial court may "grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." Utah R. Crim. P. 24(a). "Trial judges are given a wide range of discretion in determining whether newly discovered evidence . . . merit[s]

---

[4]Pennington also testified that after the assault, he tried to contact defense counsel because defendant pounded on the cell wall and passed him notes indicating that his attorney would get him "off of a bunch of charges" if he dropped the charge against him. T-2: 30-32. At defendant's behest, Pennington flushed the notes. T-2: 31.

the grant of a new trial." *State v. James*, 819 P.2d 781, 793 (Utah 1991). Indeed, this Court will "assume that the trial court exercised proper discretion unless the record clearly shows the contrary." *Id.* Defendant has not demonstrated that the trial court acted outside its discretion in denying his motion for a new trial and his claim on appeal must therefore fail.

A. THE NEWLY DISCOVERED EVIDENCE TEST.

The test for determining whether a recantation of trial testimony merits a new trial is the same used for any newly discovered evidence. "[T]he moving party must demonstrate from the proffered evidence that: '(i) it could not, with reasonable diligence, have been discovered and produced at the trial; (ii) it is not merely cumulative; and (iii) it must make a different result probable on retrial.'" *State v. Loose*, 2000 UT 11, ¶ 16, 994 P.2d 1237 (quoting *State v. Martin*, 1999 UT 72, ¶ 5, 984 P.2d 975). Because the first two criteria of the test were not at issue below, *see* T-2: 62, this appeal turns on the third criterion—whether the newly discovered evidence "make[s] a different result probable on retrial," *Loose*, 2000 UT 11, at ¶ 16.

In *State v. Loose*, 2000 UT 11, 994 P.2d 1237, the Utah Supreme Court established the framework for determining whether newly discovered evidence makes a different result probable on retrial. In that case, the defendant was convicted of sodomy on a child and sexual abuse of a child, largely upon the testimony of the victim. *Id.* at ¶¶ 5-7. After trial, the victim wrote a letter to a friend indicating she had lied while testifying. *Id.* at ¶ 7. Defendant moved for a new trial based on that letter. *Id.* At an evidentiary hearing on the motion, the victim retreated from the statement in her letter, maintaining that her trial

testimony was true and explaining that the letter was simply an attempt to cause problems for her mother. *Id.* at ¶ 17. The trial court denied the motion for a new trial, finding that the victim was not truthful in her letter and accepting her explanation for writing the letter. *Id.*

The Supreme Court recognized that in determining whether newly discovered evidence would make a different result probable on retrial, the trial court must necessarily determine the "probable weight" of the evidence. *See id.* at ¶ 18. The Court held that in making that determination, the trial court should consider several factors, including (1) "the substance of the proffered testimony," (2) "the likelihood that a jury would find [the newly discovered evidence] credible," and (3) "the other evidence offered at [ ] trial." *Id*; *accord State v. Hoffhine*, 2001 UT 4, ¶ 28, 20 P.3d 265. The Court held that the "interplay" among these facts will be determinative of the issue. *Id.* After considering these factors, the Supreme Court affirmed the decision of the trial court, finding that the recantation letter did not make a different result probable "where the witness would not recant under oath, maintained that her trial testimony was true and that the recantation was false, and gave a cogent explanation for the recantation." *Id.*

B. Defendant Has Not Demonstrated That the Trial Court Abused its Discretion in Determining that the Recantation Does Not Make a Different Result Probable on Retrial.

Defendant here contends that "if Mr. Pennington testifies according to his letter at a retrial of this case, a different result is probable." Aplt. Brf. at 3. On this proposition alone he rests his argument that the trial court erred in denying his motion for new trial. He neither examines the substance of the letter, the probable credibility of Pennington, nor the evidence

introduced at the trial. On the other hand, the trial court examined each of these factors and properly concluded that the letter would not make a different result probable on retrial.

1. Defendant Has Not Challenged the Trial Court's Finding That the Recantation in the Letter Was "Very Weak."

Consistent with *Loose*, the trial court considered the substance of Pennington's letter and found that the recantation therein was "very weak." T-2: 62. A review of the letter supports the trial court's finding. The letter read as follows:

> To Judge McKiff
>
> My name is Mark Aaron Pennington. I was a witness in court on Sept. 21, 2000 on David Taylor. I came to make this statement on my own free will. I did not want to testify agenst [sic] David. But some officers told me I would be put in a Utah State Prison if I did not testify. I told Don Brown I did not want to testify and he said "Well you have too [sic] . . . It is to [sic] late to turn Back!" And so with this I was sapeanad [sic] to testify. The Officer also told me "We need you to put this son of a Bitch away for a long time!" I have Tryed [sic] to stop this mayham [sic] but I was brow beaten into it. I would like to also say that I have nothing against David Taylor. He is not the problem. The court should look at the Polic [sic] officers for discrimanation [sic] against an inmate. I did what I was made to do not upon my own free will. All I wanted is to Just live my life with no problems. But Sevier County Officers pushed me into this and I never wanted anything to happen Because nothing ever did! Thank you Mark Aaron Pennington.
>
> /s/
>
> Sept 23 2000

R. 100 (Addendum). As noted by the trial court, "[t]he primary thrust of the [letter] is the defendant wanting to avoid trouble." T-2: 63. Twice defendant indicates in the letter that he does "not want to testify." R. 100. He then states that he tried to "stop this mayham [sic]." R. 100. He goes on to state that he has nothing against defendant, that he did not testify at trial of his own free will, and that he wants to just "live [his] life with no problems." R. 100. Throughout, he contends that he was pressured into testifying. R. 100. Not until the final three words of his statement does Pennington appear to deny that an assault occurred, stating that "I never wanted anything to happen Because [sic] nothing ever did!" R. 100. The trial court's finding that the recantation was "very weak" is thus supported by the evidence and defendant has not demonstrated otherwise.

2. Defendant Has Not Challenged the Trial Court's Finding That the Victim's Testimony at the Evidentiary Hearing Was Credible.

After defendant filed his motion for a new trial, the court held an evidentiary hearing—wholly ignored by defendant on appeal. R. 107, 110-12; T-2. At that hearing, Pennington confirmed the veracity of his trial testimony, stated that the letter was not true, and explained that he wrote it because of threats made against him and his family. T-2: 7-10, 15. The court also heard testimony from defendant and his mother. *See* T-2: 33-45. After hearing that testimony, the trial court accepted Pennington's explanation for writing the letter, finding "Mr. Pennington's testimony [ ] to be credible." T-2: 62.

Defendant not only fails to challenge the trial court's finding, but fails to acknowledge the testimony altogether. *See* Aplt. Brf. at 2-4. He claims that the trial court should have

granted a new trial "because if Mr. Pennington testifies according to his letter at a retrial of this case, a different result is probable." Aplt. Brf. at 3. That outcome, however, is improbable given Pennington's repudiation of the letter at the evidentiary hearing.

3. **Because Defendant Did Not Include a Transcript of the Trial in the Record on Appeal, the Evidence at Trial Is Presumed to Support the Court's Denial of the Motion for a New Trial.**

Finally, the trial court considered the testimony of the witnesses at trial. In denying the motion, the court specifically noted the evidence introduced at trial. It observed that both defendant and Pennington testified at the trial and that conflicts existed in their testimony. T-2: 62. The court also observed, however, that there were some corroborating witnesses and that the jury ultimately found defendant guilty. T-2: 62.

Notwithstanding the court's reliance on the trial testimony in denying the motion for a new trial and *Loose's* requirement that trial testimony be considered, defendant did not include a transcript of the trial in the record on appeal. Without knowing the evidence introduced at the trial, this Court cannot determine whether that evidence rendered any subsequent recantation unimportant (e.g., independent testimony, video tape of assault, recorded confession). The minutes of the jury trial indicate that in addition to Pennington, two other witnesses testified on behalf of the State: Russell G. Grooms during the State's case-in-chief and Deputy Greg Harward during the State's rebuttal. *See* R. 70. The minutes also indicate that an audio tape of a telephone conversation was admitted in the State's case-in-chief and was played for the jury. R. 70. However, absent a transcript of the trial, the

Court is powerless to determine the impact of the letter or a subsequent recantation by the victim.

Where, as here, an appellant "fails to provide an adequate record on appeal, [this Court] will presume the correctness of the proceeding below." *State v. Snyder*, 932 P.2d 120, 131 (Utah App. 1997). Accordingly, this Court must presume that the trial evidence, apart from the victim's testimony, supported the trial court's determination that the recantation would not make a different result probable on retrial.

* * *

In sum, the probable weight of Pennington's recantation was severely undermined by the less-than-persuasive nature of the recantation itself, Pennington's subsequent testimony reaffirming his trial testimony, the trial court's finding that Pennington was credible, and the other evidence introduced at trial. Therefore, as in *Loose*, the trial court below did not abuse its discretion in denying defendant's motion for new trial "where the witness would not recant under oath, maintained that [his] trial testimony was true and that the recantation was false, and gave a cogent explanation for the recantation." *See Loose*, 2000 UT 11, at ¶ 18.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction.

Respectfully submitted this 24th day of June, 2002.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of June, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, David R. Taylor, by causing them to be delivered via first class mail, postage prepaid, to his counsel of record, as follows:

Keith C. Barnes
Jensen, Graff & Barnes, LLP
250 South Main P.O. Box 726
Cedar City, UT 84720

Jeffrey S. Gray
Assistant Attorney General

ADDENDUM

Copy - sent to Dave's lawyer

To Judge Mckiff

My Name is Mark Aaron Pennington. I was a witness in coart on Sept. 21, 2000 on David Taylor. I came to make this statement on my own free will. I did not want to testify agenst David. But some officers told me I would be put in a Utah State Prison if I did not testify. I told Don Brown I did not want to testify and he said "Well you have too... It is to late to turn Back!" And so with this I was sapeanad to testify. The Officer also told me "we need you to put this son of a Bitch away for a long time!" I have Tryed to stop this mayham but I was brow beaten in to it I would like to also say that I have nothing against David Taylor. He is not the problem. The court should look at the Polic officers for discrimanation against an inmate. I did what I was made to do not upon my own free will. All I wanted is to Just live my life with no problems. But Sevier County Officers pushed me into this and I never wanted any thing to happen Because nothing ever did! Thank you Mark Aaron Pennington

Mark Pennington

Sept. 23 2000

Notary - see ATTACHMENT

ATTACHED TO STATEMENT TO JUDGE MCKEE.

STATE OF UTAH)
SS.
COUNTY OF Sevier)

On this day personally appeared before me MARK PENNINGTON to me known to be the individual, or individuals described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned. Given under my hand and official seal this 23rd day of September, 2000.

Heather J Mason
Notary Public

Residing at: Aurora, Utah

Commission Expires: 2/16/01

HEATHER J MASON
Notary Public
State of Utah
My Comm. Expires Feb 16 2001
387 N Main Richfield UT 84701

SMS Vision Form NONOTRY Rev. 07/10/97